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In the Supreme Court of the United States

FEBRUARY TERM, 1965

No. 920

GENNARO J. ANGIULO,
PETITIONER

v.

PATRICK J. MULLINS, SPECIAL AGENT
INTERNAL REVENUE SERVICE
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled cause on December 3, 1964.

Opinions Below

The opinion in the United States District Court for the District of Massachusetts is reported in 227 F. Supp. 524 and set out at R. 52-55. The opinion of the Court of Ap-

peals for the First Circuit is reported in 338 F. 2d. 820 and is annexed hereto as Appendix A.

Judgments Below

The judgment of the United States District Court for the District of Massachusetts was entered on March 27, 1964 and is set out at R. 55-56. The Judgment of the Court of Appeals is dated December 3, 1964 and is annexed hereto as Appendix B.

A petition for rehearing, filed by the petitioner here, was denied by the Court of Appeals on January 6, 1965.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254, 28 U.S.C. 7604, and 28 U.S.C. 2101.

Questions Presented

I. Where petitioner claimed and otherwise suggested both before and after hearing pursuant to an administrative summons *duces tecum* that he could not produce the books and records sought, and the Government was not misled, can petitioner be required to elect between prosecution for non-production of records and explaining under oath his failure to produce said records even though such an explanation would tend to incriminate him.

II. Where petitioner attended hearing in response to an administrative summons *duces tecum* and was at no time during the hearing asked by respondent to produce the records called for in the summons or to explain their non-production, was petitioner required to volunteer an explanation for their non-production even though such an explanation would tend to incriminate him.

III. Did the District Court err in finding that petitioner failed to comply with the administrative summons *duces tecum* where petitioner was at no time asked, during the hearing pursuant to said summons, to produce the summonsed records.

IV. Did the District Court err in finding that the petitioner failed to comply with the summons where there was no evidence that the petitioner had the ability to comply with a demand for production, if any such demand was made.

V. Did the District Court err in requiring production of records for a year not specified in the administrative summons.

Constitutional Provisions and Statutes Involved

The Constitutional provision involved in this case is the Fifth Amendment to the United States Constitution. The statutes involved in this case are 26 U.S.C. 7201, 26 U.S.C. 7203, 26 U.S.C. 7602 and 26 U.S.C. 7604.

Statement

This is a civil action in which the respondent, Mullins, a Special Agent of the Internal Revenue Service, brought an action in the United States District Court of Massachusetts pursuant to 26 U.S.C. 7604, seeking an order directing compliance with an administrative summons previously served pursuant to 26 U.S.C. 7602, on the petitioner, Angiulo, a trustee of the Huntington Realty Trust.

On September 11, 1963, the petitioner was served with the summons requiring him to produce certain books and records of the Huntington Realty Trust for examination by the respondent who was conducting an investigation

into the matter of the tax liability of the said Trust (R. 14-15, Ex. 8, R. 87-91).

The petitioner appeared before Special Agent Mullins as required by the summons but answered all questions relating to the records by invocation of his privilege against self-incrimination (R. 16, Ex. 8, R. 87-91).

Prior thereto, on September 3, 1963, certain records of the Trust had been turned over to the respondent by one Michele Angiulo and were still in the possession of Mullins on September 24, 1963 (R. 27, 24-25, Ex. c, R. 113). Michele Angiulo was another of five trustees of Huntington (R. 50, Ex. 9, R. 91).

On December 9, 1963 the United States Attorney filed a Petition for Attachment as for Contempt (R. 3) and the District Court Judge issued an Order to Show Cause on Petition (R. 8).

The petitioner here filed a motion to dismiss the petition (R. 9), the decision on which was reserved until after the case was tried (R. 14). The matter was then heard and tried on the merits, after which the District Court Judge issued a Memorandum and Order directing the petitioner to appear and produce the papers and records designated in the summons and certain other papers and records for a year not so designated (R. 52-56).

The petitioner thereupon filed a notice of appeal to the Court of Appeals for the First Circuit, (R. 56), together with a supersedeas bond which was approved conditionally by the District Court, thereby staying the Order in controversy.

On appeal, the United States Court of Appeals for the First Circuit affirmed the ruling below (Appendix, pp. 1a-4a).

Reason for Granting Writ

THE DECISION OF THE COURT OF APPEALS CREATES AN IRRECONCILABLE CONFLICT BETWEEN PRIOR SUPREME COURT DECISIONS

In deciding that the petitioner Angiulo had an adequate opportunity at the hearing to explain that he could not produce the summonsed records, the Court of Appeals has interpreted two decisions of this Court in a manner which makes them irreconcilable.

At page 3 of its decision (Appendix, p. 3a) the Court of Appeals stated:

> "Respondent contends, however, that since the records were never actually demanded of him by petitioner at the hearing, we have no way of knowing that he could produce them, and that no inferences may be drawn from his assertion of his Fifth Amendment rights when he was asked questions pertaining to the records. It is true that respondent could not be forced to answer questions pertaining to the records *Curcio* v. *United States*, 354 U.S. 118 (1957). However, respondent had adequate opportunity to explain at that time that he could not produce them, and he cannot now raise a claim to the contrary. *McPhaul* v. *United States*, *supra*. See also *United States* v. *Bryan*, 339 U.S. 323 (1950)"

It is respectfully submitted that the petitioner never did have an adequate opportunity to explain his failure to produce the summonsed records because they were never demanded of him by the Special Agent at the hearing and to volunteer any explanation or account for their non-production would have tended to incriminate the respondent

and would have constituted a waiver of his privilege to decline to answer further questions regarding them.

The best evidence of what occurred during the proceedings before the agent on September 24, 1963, is contained in the official transcript (Ex. 8, R. 87-91).

The nearest approach to a demand for production is Question 6 of Exhibit 8 (R. 89):

> "On September 3, 1963, certain records were submitted pertaining to the Huntington Realty Trust. Do you have any other records with you here today which are called for on the summons?"

In reply to this question, the petitioner invoked his privilege against self-incrimination. At no point did he flatly refuse to produce the records and it is respectfully submitted that since he consistently took refuge in the Fifth Amendment no inference can be drawn from anything said or left unsaid by him. The propriety of such a response was upheld in *Curcio* v. *United States*, 354 U.S. 188, 77 S. Ct. 1145 (1957). In that case, one of the questions with respect to which the Court upheld the witness's right to invoke his privilege was:

> "Do you have possession of those records or of any of them today?" 354 U.S. at 120 (footnote 1).

On the other hand, the questions put by the respondent in the instant case should be contrasted with those put in *McPhaul* v. *United States*, 364 U.S. 372 (1960), where the interrogator was careful to draw the distinction between questions "pertaining to" the records and a demand for their production and where the witness flatly rejected the demand, thereby raising the inference that he could, but simply would not, produce the records:

> "Mr. Tavenner: My question to you was not answered by that statement, in my judgment. My question was whether or not you are refusing to produce the records which you were directed to produce under this subpoena?
> "Mr. McPhaul: I have answered it in this statement.
> "Mr. Tavenner: No sir. You have stated that you refuse to answer any questions pertaining to them. I have not asked you a question that pertains to them. I have asked you to produce the records. Now, will you produce them?
> "Mr. McPhaul: I will not." 364 U.S. at 376.

Indeed, in the *McPhaul* case, the four-justice dissenting opinion expressed the view that the witness should be asked not only to produce the records but also whether he has the power to produce them. 364 U.S. at 386 (footnote 3).

It is submitted, therefore, that the respondent was required to make a clear and unequivocal demand for production of the records, particularly where, as here, the witness is apparently seeking in good faith to avoid any word or act that might be construed as a waiver of his privilege against self-incrimination.

The finding by the Court of Appeals that the books and records of the trust are privileged does not alter the fact that the petitioner was without a non-incriminatory opportunity to explain that he could not produce them. In *Curcio* v. *United States*, 354 U.S. 118, 77 S. Ct. 1145 (1957), the Court stated:

> "From the fact that the custodian has no privilege with respect to union books in his possession, the Government reasons that he also has no privilege with respect to questions seeking to ascertain the whereabouts of books and records which have been sub-

> poenaed but not produced. In other words, when the custodian fails to produce the books, he must, according to the Government, explain or account under oath for their non-production, even though to do so may tend to incriminate him.
> "The Fifth Amendment suggests no such exception." 354 U.S. 118 at 123.
>
> * * *
>
> "[F]orcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. This is contrary to the spirit and the letter of the Fifth Amendment." 354 U.S. 118 at 128.

The only opportunity the petitioner had was to voluntarily disclose that the records were not in existence. This disclosure, made under oath by the petitioner, himself, would have made him vulnerable to prosecution for failure to keep records (26 U.S.C. 7203), and, further, it would have furnished the government with a link in the chain of evidence leading to a conviction for income tax evasion (26 U.S.C. 7201) since the lack of records would be one of the *indicia* of "willfullness."

Furthermore, the petitioner could not *volunteer* evidence regarding the records without risking a waiver of his privilege to answer further question regarding them. *Rogers* v. *United States*, 340 U.S. 367, 71 S. Ct. 438 (1951). As was stated by Mr. Justice Black in his dissent:

> "Moreover, today's holding creates this dilemma for witnesses: On the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other hand, they might lose the privilege if they answer a single question. The Court's view makes

> the protection depend upon timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it." 340 U.S. 367 at 378.

Counsel for the petitioner agree with the comment of Dean Erwin N. Griswold of Harvard Law School:

> "Under the *Rogers* case the only really safe advice a lawyer can give his client is to claim the privilege at the earliest possible moment so as to avoid a charge of waiver." Griswold, *The Fifth Amendment: An Old and Good Friend*, 40 A.B.A.J. 502, 535 (1954).

In light of these facts the petitioner and his counsel are at a loss to understand what opportunity the petitioner had to explain that he could not produce the records, at what point the explanation could have been presented, and the extent of the required explanation. Indeed, the petitioner is still, at this advanced stage of the proceedings, no better informed.

In concluding that the petitioner had adequate opportunity to explain that he could not produce the records, the Court of Appeals attempted to follow the *McPhaul* doctrine. However, it is apparent that the *McPhaul* and *Bryan* cases are readily distinguishable from the instant case and, therefore, that the lower court failed to give sufficient vitality to *Curcio*.

In *McPhaul*, the witness "never claimed," 364 U.S. at 378, either before the summonsing body, the District Court, the Court of Appeals, or the Supreme Court that the records did not exist, nor did he even "suggest" his inability to produce the records, 364 U.S. at 379. Moreover, he did not attempt "to introduce any evidence at his contempt trial of his inability to produce" the records, 364 U.S. at 380.

In the instant case, however, the petitioner has claimed or, at least, suggested his inability to produce the records by raising the issue during argument on his motion to dismiss the petition (R. 12), and, in his memorandum in support of said motion, the petitioner both suggested and claimed that there were no further records known to him (R. 52). Even prior to that time, Mr. Colicchio, the attorney for another of the trustees, had told the respondent that "there were no more records" (R. 49-50) and on September 24, 1963, it "could have happened" that the respondent was advised by the petitioner's attorney that "there were no other records" (R. 49). Furthermore, the petitioner here attempted to, and did, introduce evidence of his inability to produce further records, by way of the statement of Mr. Colicchio that there were no further records (R. 50).

Therefore, the respondent has not been misled and, if he had the sworn statement of the petitioner that the records did not exist, he would be in no better position with respect to obtaining them than he is at present. However, the petitioner, by explaining under oath that he could not produce the records, would have incriminated himself and would have waived his privilege with respect to further questions regarding the records.

The instant case is also distinguishable from the *Bryan* case, for there the witness not only admittedly had control of the records, 339 U.S. at 325, but she was found to be patently lacking in good faith, 339 U.S. at 332.

Conclusion

Here, the witness has in good faith used every means available, short of incriminating himself, to inform the summonsing body that there are no further records. Yet, under the interpretation of the *McPhaul* decision by the

Court of Appeals, he finds himself in the dilemma wherein he must either incriminate himself or be held in contempt. It is respectfully submitted that such an interpretation is inconsistent with the holding in the *Curcio* case and was not the result intended in *McPhaul*. Moreover, it is submitted that *McPhaul* and *Curcio* can, and should be, harmonized to enforce the Government's right to obtain unprivileged records and, at the same time, to preserve the individual privilege against self-incrimination.

Respectfully submitted,

Francis J. DiMento
DiMento & Sullivan
Ronald R. Popeo
Attorneys for petitioner

Appendix A

United States Court of Appeals
For the First Circuit

No. 6334.

GENNARO J. ANGIULO,

RESPONDENT, APPELLANT,

v.

PATRICK J. MULLINS, SPECIAL AGENT, INTERNAL REVENUE SERVICE,

PETITIONER, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Francis J. DiMento, with whom *DiMento & Sullivan* and *Ronald R. Popeo* were on brief, for appellant.

Murray H. Falk, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

December 3, 1964.

HARTIGAN, *Circuit Judge*. This is an appeal from an order of the United States District Court for the District of Massachusetts filed March 27, 1964, requiring respondent, Gennaro J. Angiulo to appear and produce certain books and records of the Huntington Realty Trust for the calendar years 1957, 1958, 1959, 1960, 1961 and 1962. The action was brought in the district court pursuant to 26 U.S.C. § 7604 by petitioner, a Special Agent of the Internal Revenue Service, assigned to an investigation of the tax liability of that trust.

Acting under 26 U.S.C. § 7602[1] petitioner served an administrative subpoena on respondent, a trustee of the trust, directing him to appear with the books and records of the Huntington Realty Trust for the years 1957, 1958, 1959, 1961 and 1962. Respondent appeared before the petitioner, failed to produce the books and records, and on Fifth Amendment grounds declined to answer any question put to him. The district court found that the petitioner had reasonable cause to believe that the records for those years did exist and that they were in respondent's custody and control; that they were not privileged; that the trust filed no return for 1958 and that petitioner was therefore entitled to inspect the books and records for 1957 to 1959. Accordingly, the court ordered production of books and records for the calendar years 1957 through 1962, including 1960, which year was inadvertently omitted from the administrative subpoena.

Respondent contends principally on this appeal that petitioner failed to show an ability to produce the books and

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[1] "§ 7602. *Examination of books and witnesses*

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

records, and that in any event they are privileged. Respondent's first contention must fail if the district court was correct in its determination that petitioner reasonably believed the books and records existed. Upon such a showing, the burden shifts to the person subpoenaed to show that he cannot produce the records. *McPhaul* v. *United States*, 364 U.S. 372 (1960). There is adequate evidence in the record to support that finding. There was testimony to the effect that the tax returns which were filed could not have been prepared without certain books and records, and petitioner testified that in an earlier hearing an attorney told him in the presence of respondent's brother, another trustee of the trust, that respondent had custody of the records of the Huntington Realty Trust. Respondent contends, however, that since the records were never actually demanded of him by petitioner at the hearing, we have no way of knowing that he could produce them, and that no inferences may be drawn from his assertion of his Fifth Amendment rights when he was asked questions pertaining to the records. It is true that respondent could not be forced to answer questions pertaining to the records. *Curcio* v. *United States*, 354 U.S. 118 (1957). However, respondent had adequate opportunity to explain at that time that he could not produce them, and he cannot now raise a claim to the contrary. *McPhaul* v. *United States*, *supra*. See also *United States* v. *Bryan*, 339 U.S. 323 (1950).

Respondent's contention that the books and records of the trust are privileged is without merit. The Huntington Realty Trust is a Massachusetts business trust and "possesses many of the attributes that are characteristic of a corporation." *State Street Trust Co.* v. *Hall*, 311 Mass. 299, 41 N.E. 2d 30 (1942). Since respondent holds the trust's books and records in a representative capacity, he is not entitled to invoke the privilege against self-incrimination as to them. *United States* v. *White*, 322 U.S. 694 (1944).

Respondent's contention that an examination of the records for 1957 through 1959 is unnecessary is answered by the wording of the statute, 26 U.S.C. § 7602. Certainly records for those years would be relevant to a determination of the trust's 1958 tax liability. As to 1958, the district court was entitled to believe testimony by the Chief of the Records Management and Service Section, Office of the District Director of Internal Revenue for Massachusetts, that no return was received for the Huntington Realty Trust for that year.

We have considered the other contentions raised by respondent and find them to be without merit.

Judgment will be entered affirming the judgment of the district court.

Appendix B

Judgment

December 3, 1964

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) Roger A. Stinchfield
Clerk

Approved:
(s) Peter Woodbury
Ch.J.

Appendix C

United States Constitution, Fifth Amendment

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

26 U.S.C. 7201. Attempt to evade or defeat tax.

> "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

26 U.S.C. 7203

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. 7602

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

26 U.S.C. 7604. Enforcement of Summons

"(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear,

to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

"(b) Enforcement.—Whenever any person summoned under section 6420 (e)(2), 6421 (f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

MEMORANDUM FOR RESPONDENT IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 920

GENNARO J. ANGIULO, PETITIONER

v.

PATRICK J. MULLINS, SPECIAL AGENT,
INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In September, 1963, respondent, a Treasury agent investigating the tax liability of the Huntington Realty Trust, served upon petitioner a Treasury Department summons requesting, *inter alia*, that petitioner, as Trustee, produce certain named books and records of the Trust (R. 15, 53, 57).[1] Petitioner appeared with his attorney on the day specified in the summons but failed to bring with him or to produce the books and records. He refused to state whether he had brought any of the books and records, or to

[1] The summons, issued under authority of Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C. 7602), was addressed to petitioner (who is sometimes known as Jerry J. Angiulo—R. 15, 29, 99, 102, 105, 108, 111) as "Gennaro J. Angiulo, Trustee" (R. 57).

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make any statement except that his refusal was based on the Fifth Amendment privilege against self-incrimination (R. 50, 87–91). The government thereupon instituted this enforcement proceeding in the district court, as provided by Section 7604 of the Internal Revenue Code of 1954 (26 U.S.C. 7604), not for the purpose of punishing petitioner for failure to produce the books and records, but in order to secure a court order requiring him to produce the documents.

The district court found that the United States had reasonable grounds to believe that the records in question were in existence and in the custody or control of petitioner. There was ample evidence to support this finding: One Iandoli, who prepared the Trust's tax returns from figures submitted to him by one of the Angiulo brothers, conceded that the figures could not have been compiled without the information contained in some of the books and records called for by the summons (R. 29, 30). Special Agent Mullins testified to the same effect (R. 19). It was shown, moreover, that eight days before the instant summons was issued to petitioner, Mullins had interviewed another of the trustees, Michele Angulo, who appeared with his attorney, Colicchio, in response to an earlier summons. Michele produced a few fragmentary records of the Trust (R. 21–26); Colicchio then advised Mullins that petitioner had custody of the Trust's records (R. 16, 18–19). The district court also found that the records were kept by petitioner only in a representative capacity and that therefore petitioner could be required to produce them without abridging his Fifth

Amendment privilege (R. 54). *United States* v. *White*, 322 U.S. 694, 699.

Treating the decision below as if it were the affirmance of a conviction for contempt, petitioner argues that the decision is in conflict with *McPhaul* v. *United States*, 364 U.S. 372, and *Curcio* v. *United States*, 354 U.S. 118. These decisions, which deal with the legitimate inferences to be drawn from a failure to explain a refusal to produce documents and with the scope of the Fifth Amendment privilege to refuse to answer questions as to the whereabouts of documents, are plainly not in point in the present case. Here the government need not rely upon petitioner's refusal to discuss the whereabouts of the documents sought or to explain his failure to produce them. Having substantial evidence from other parties that the Trust records are in petitioner's hands, the government has properly obtained an order requiring him to produce them. In this context there is obviously no conflict even with the dissent in *McPhaul*, and *Curcio* is wholly beside the point. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

MARCH 1965.

U. S. GOVERNMENT PRINTING OFFICE 1965